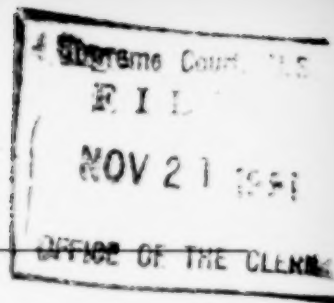


NO. 90-8466



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In the  
SUPREME COURT OF THE UNITED STATES  
October Term, 1991

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DAVID E. RIGGINS,  
Petitioner,

v.

THE STATE OF NEVADA,  
Respondent.

---

ON WRIT OF CERTIORARI TO THE  
SUPREME COURT OF THE STATE OF NEVADA

---

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION  
OF CRIMINAL DEFENSE LAWYERS ON THE MERITS  
IN SUPPORT OF PETITIONER

---

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## ISSUE PRESENTED FOR REVIEW

WHETHER THE STATE OF NEVADA'S FORCED DRUGGING OF A CRIMINALLY ACCUSED CITIZEN DURING HIS TRIAL FOR FIRST DEGREE MURDER UNCONSTITUTIONALLY DEPRIVED HIM OF HIS RIGHT TO EFFECTIVELY DEFEND HIMSELF AGAINST THAT CHARGE AND THE IMPOSITION OF A DEATH SENTENCE.

**STATEMENT OF THE INTEREST  
OF THE AMICUS CURIAE**

The National Association of Criminal Defense Lawyers, Inc., (NACDL) is a District of Columbia non-profit corporation with a nation-wide membership of more than 5,000 lawyers and 25,000 affiliate members. NACDL was founded over twenty-five years ago to promote study and research in the field of criminal defense law, to disseminate and advance the knowledge of the law in the field of criminal defense practice, and to encourage the integrity, independence and expertise of defense lawyers.

Among NACDL's stated objectives is the promotion of the proper administration of criminal justice. Consequently, NACDL is concerned with the protection of individual rights and the

improvement of the criminal law, its practices and procedures. A cornerstone of this organization's objectives, and of the criminal justice system, is the fundamental constitutional protection of an individual's Sixth Amendment rights to present a defense to criminal charges and to the effective assistance of counsel. NACDL is very concerned about any decision that would undermine or dilute these constitutional guarantees, as would adoption of the position taken by the respondent in the instant case.

The Amicus Curiae Committee of the NACDL has discussed this case and decided that the issues are of such importance to defense lawyers and criminal defendants throughout the nation that NACDL should offer its assistance to the Court. Both the petitioner and the respondent have consented to NACDL's participation as amicus curiae pursuant to Rule 37.3 of the Rules of this Court, and letters of consent have been filed with this Court.

#### SUMMARY OF THE ARGUMENT

The decision of the Supreme Court of Nevada in the instant case should be reversed. The trial court's order denying Mr. Riggins' motion to terminate his medication with a powerful tranquilizer deprived Mr. Riggins of his right to effectively defend himself against the charge of first degree murder and the imposition of a death sentence.

The trial court's order also precluded Mr. Riggins' counsel from providing his client the effective assistance of counsel to which he was entitled under the Sixth Amendment to the United States Constitution.

David Riggins' personality and demeanor in an untranquilized state are an integral part of his defense of insanity at the time of the offense, and accordingly

his counsel moved to permit the jury to see this evidence. The court's order prevented this from occurring.

Further, the standards applicable to counsel in death penalty cases require that all efforts be made to present a "humanized" individual to the jury -- a living, breathing, feeling, and responsive individual upon which the jury will be less likely to impose a sentence of death. Because the state forced medication upon Mr. Riggins, transforming him into a sedate, non-responsive individual, Mr. Riggins' counsel was unable to comply with the standards applicable to attorneys representing clients in capital cases.

This Court has made clear that a citizen accused of a criminal offense has a clear right to present all relevant evidence in his effort to defend himself and that unjustified state imposed

restrictions upon that ability will be struck down.

This Court also has made clear that the right to a fair trial encompasses the right to effective assistance of counsel and has struck down unjustified restrictions upon counsel's ability to make independent decisions about how the defense of his or her client should be conducted.

The state's action in this case is constitutionally indistinguishable from state controls on how a defense can be presented to criminal charges and how an attorney can provide effective representation to his or her client.

For all these reasons, the Supreme Court of Nevada's decision affirming the forced medication of an individual during his criminal trial with no concrete justification must be set aside by this Court.

## ARGUMENT

### THE FORCED DRUGGING OF A CRIMINALLY ACCUSED CITIZEN DURING HIS TRIAL FOR FIRST DEGREE MURDER DEPRIVED HIM OF HIS CONSTITUTIONAL RIGHTS TO EFFECTIVELY DEFEND HIMSELF AGAINST THAT CHARGE AND THE IMPOSITION OF A DEATH SENTENCE

The question this Court answers in this case will have a far reaching impact upon the balance of power currently built into our criminal justice system. That question is under what circumstances the state and not the criminally accused and his or her counsel can control the defendant's appearance and behavior during the trial. In other words, can the critical choice of how the defendant will be presented to the jury be constitutionally removed from the defendant's table in the court room and placed in the hands of the state that seeks to convict and punish him?

Amicus NACDL asserts that for the reasons that follow, the State of Nevada's interference, in fact, control, over how David Riggins presents himself to the jury in an effort to defend against the charge of first degree murder (and if unsuccessful, persuade that jury not to impose upon him a sentence of execution by lethal injection) constitutes an impermissible deprivation of his right to defend himself and to the effective assistance of counsel in that effort.

#### A. A Citizen Accused's Sixth and Fourteenth Amendment Rights to Present a Defense and to the Effective Assistance of Counsel Free From Unjustified Governmental Interference

This Court's precedents examining a criminal defendant's trial rights are replete with decisions confirming a defendant's right to present a defense unfettered by unnecessary and unjustified state imposed controls. E.g., Washington

v. Texas, 388 U.S. 14 (1967); Webb v. Texas, 409 U.S. 95 (1972); Chambers v. Mississippi, 410 U.S. 284 (1973); Ake v. Oklahoma, 470 U.S. 68 (1985).

This Court's precedents also illustrate that the defendant's right to effective assistance of counsel is abridged when a governmental entity interferes with the ability of counsel to make independent decisions about how to conduct the defense. E.g., Geders v. United States, 425 U.S. 80 (1976); Herring v. New York, 422 U.S. 853 (1975); Brooks v. Tennessee, 406 U.S. 605, 612-13 (1972); Ferguson v. Georgia, 365 U.S. 570, 593-96 (1961).

It is these two distinct but interrelated rights that were abridged by the forced drugging of David Riggins during his trial for first degree murder.

# 1. An Accused's Right to Present a Defense Free From Unjustified Governmental Interference

In Washington v. Texas, 388 U.S. 14 (1967), the Court was faced with the constitutional impact of a Texas statute that prevented individuals charged as a co-participants in the same crime from testifying for one another although there was no bar to their testifying for the state. 388 U.S. at 16-17. This Court unanimously held that this statute unconstitutionally precluded the defendant from presenting evidence relevant to his defense. Id. at 23.

The Washington Court described the right to present a defense as follows:

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as

the prosecution's to  
the jury so it may  
decide where the truth  
lies. . . . This right  
is a fundamental  
element of due process  
of law.

Id. at 19. (emphasis supplied).

The Court thus balanced a state's  
evidentiary rule which had a legitimate  
(but severely criticized) justification  
with the fundamentally important right of a  
defendant to present his defense and struck  
the balance in favor of the defendant's  
right to fully present his defense. See  
also, Webb v. Texas, 409 U.S. 95, 98  
(1972); Chambers v. Mississippi, 410 U.S.  
284, 294 (1973).

The most recent refinement of  
this Court's jurisprudence addressing the  
fundamental right to present a defense is  
Ake v. Oklahoma, 470 U.S. 68 (1985). The  
issue in Ake was whether the Constitution  
requires that an indigent defendant have

access to the psychiatric examination and  
assistance necessary to prepare an  
effective defense based on his mental  
condition. Id. at 71.

The Court reaffirmed that a  
"criminal trial is fundamentally unfair if  
the State proceeds against an indigent  
defendant without making certain that he  
has access to the raw materials integral to  
the building of an effective defense." Id.  
at 77. The Court emphasized that the  
State's interest is not simply in  
prevailing at trial but encompasses  
something broader -- the interest in the  
fair and accurate adjudication of criminal  
cases. Therefore, the Court declared that  
"a state may not legitimately assert an  
interest in maintenance of a strategic  
advantage over the defense, if the result  
of that advantage is to cast a pall on the

accuracy of the verdict obtained." Id. at 79.

Therefore, the Ake Court went beyond merely striking down an unjustified restriction on the defendant's opportunity to present evidence to the jury that would bolster his defense and assist the jury in its fact finding function. The Court imposed an affirmative obligation to provide the defendant with the opportunity to present all pertinent evidence because of the importance of that evidence to an accurate verdict.

Accordingly, at the core of this Court's decisions embracing the defendant's unabridged right to present a defense is its recognition not only of fundamental fairness in our adversary system of justice but also its interest in ensuring that the jury is not deprived of clearly pertinent evidence, which can assist them in reaching

an accurate determination of the issue which they are confronting.

In the instant case, both of these concepts were adversely impacted by the Court's refusal to permit the termination of medication. The State of Nevada maintained an illegitimate strategic advantage over the defendant by controlling his appearance and demeanor during the trial. Furthermore, the accuracy of the jury's verdict on the question of Mr. Riggins' sanity was adversely impacted because the jury was precluded from seeing Mr. Riggins in his untranquilized state of mind -- his state of mind at the time of the offense.

## 2. The Concomitant Right To The Effective Assistance Of Counsel Free From Unjustified Governmental Interference

The constitutional right to present a defense is implemented through the defendant's sixth amendment right to counsel. This Court has made clear that the "right to counsel plays a crucial role on the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." Strickland v. Washington, 466 U.S. 668, 685 (1984) (quoting Adams v. United States, ex rel. McCann, 317 U.S. 269, 275-76 (1942)).

It is also without question that the right to counsel is the right to the effective assistance of counsel and that the Government violates this when it "interferes in certain ways with the

ability of counsel to make independent decisions about how to conduct the defense." Strickland, 466 U.S. at 686 (citing Geders v. United States, 425 U.S. 80 (1976) (bar on attorney-client consultation during over-night recess); Herring v. New York, 422 U.S. 853 (1975)(bar on summation at bench trial); Brooks v. Tennessee, 406 U.S. 605, 612-13 (1972) (requirement that defendant be first defense witness); Ferguson v. Georgia, 365 U.S. 570, 593-96 (1961) (bar on direct examination of defendant)).

Two of the above-cited decisions, Ferguson v. Georgia, 365 U.S. 570 (1961) and Brooks v. Tennessee, 406 U.S. 605 (1972), provide particularly persuasive precedent for the proposition that the State's control, through forced medication, of the manner in which David Riggins and his counsel chose to present Mr. Riggins to

the jury, unconstitutionally interfered with Mr. Riggins' right to the effective assistance of counsel.

The Ferguson Court reviewed a Georgia statute that precluded defense counsel from eliciting the defendant's testimony through questions. This Court held that this interference with the manner in which the defendant presented his version of the facts to the jury was unconstitutional because it deprived the accused of "'the guiding hand of counsel at every step in the proceedings,' . . . within the requirement of due process in that regard as imposed upon the States by the Fourteenth Amendment." Ferguson, 365 U.S. at 572 (quoting Powell v. Alabama, 287 U.S. 45, 69 (1932)).

The Tennessee statute at issue in Brooks controlled the order in which a defendant could present his case by

requiring that a defendant testify before any other witness for the defense. 406 U.S. at 606.

The Brooks Court found that this statute violated the defendant's constitutional right to remain silent in that the burden imposed upon the exercise of that right was not justified by the State's interest in preventing testimonial influence. 406 U.S. at 611. As an additional ground for its decision, this Court found that the Tennessee statute at issue infringed upon the defendant's right to due process as defined in Ferguson. Brooks, 406 U.S. at 612.

The Brooks Court reasoned that the choice as to whether a defendant will testify on his behalf is an important tactical decision in addition to being a constitutionally protected right. Id. The Court concluded that requiring the accused

and his lawyer to make this decision without the opportunity to evaluate the actual worth of their other evidence "restricts the defense -- particularly counsel -- in the planning of its case." Id. The Court held that the accused and his counsel may not be restricted in deciding whether and when the accused should take the stand in the course of presenting his defense. 406 U.S. at 613.

This Court has thus recognized the fundamental importance of a defendant's testimony to his defense of criminal charges. Accordingly, this Court embraced the principle that a defendant and his counsel have an unfettered right to choose whether, when, and how, the accused should take the stand. Most importantly, these two cases stand as testaments to the quickness with which this Court will strike

down state imposed controls on how this critical choice is exercised.

It follows from these decisions that if the State cannot constitutionally control the decision as to whether a defendant will testify and the manner in which he will present his testimony, the State similarly cannot constitutionally decide for the defendant the state of mind in which he will present his defense.

**B. The State of Nevada's Forced Drugging of David Riggins Violated his Constitutional Rights to Present a Defense and to the Effective Assistance of Counsel thus Depriving him of a Fair Trial**

The State of Nevada's drugging of David Riggins against his will dramatically altered his demeanor from that which existed at the time of the charged offense and thus precluded him and his counsel from presenting his message of insanity in an effective manner. The State's action also precluded Mr. Riggins' counsel from

complying with the standards for competent representation in death penalty cases. These standards mandate that a defendant on trial for his life be humanized for the jury that will decide his fate.

Thus, as a result of the state's medication of Mr. Riggins transforming him into a mask-like robot at counsel table, Mr. Riggins was deprived of his right to constitutionally effective counsel.

For the reasons that follow, these constitutional deprivations resulted in an unfair trial for Mr. Riggins and accordingly, this court should overturn the judgment of the Supreme Court of Nevada.

**1. The Messenger is an Essential Part of the Message -- The State's Forced Tranquilizing of David Riggins Deprived Him of his Right to Present the Messenger in a Fashion Essential to his Defense**

**From the jury's perspective, the message conveyed by the defense may depend as much on the messenger as on the message itself.**

**McKaskle v. Wiggins, 465 U.S. 168, 179 (1984) (emphasis supplied).**

Thus, of fundamental importance to the question at hand, this Court recognized the significance of the appearance of the defendant to the jury in its decision making process.

In McKaskle, Justice O'Connor, addressed the importance of a defendant's right to proceed pro se and noted that the participation of stand-by counsel without the defendant's consent should not be allowed to destroy the jury's perception that the defendant is representing himself.

McKaskle v. Wiggins, 465 U.S. 168, 178 (1984). Justice O'Connor made clear that the right to appear pro se exists to affirm the "accused individual's dignity and autonomy." 465 U.S. at 178. Thus, appearing before the jury in the status of one who is defending himself may be equally to the pro se defendant important as other fundamental constitutional rights. Id.<sup>1</sup>

Thus, this Court has affirmed the dignity and autonomy of the accused by stressing the importance of their right to appear to the jury as one standing alone

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<sup>1</sup> Justice O'Connor cited the right to be present at all important stages of the trial, that a defendant may not normally be forced to appear in court in shackles or prison garb, and that the defendant has a right to present testimony in his own behalf. Id. at 178 (citing Snyder v. Massachusetts, 291 U.S. 97 (1934); Estelle v. Williams, 425 U.S. 501, 504-5 (1976); Harris v. New York, 401 U.S. 222, 225 (1971); and Brooks v. Tennessee, 406 U.S. 605, 612 (1972)).

against the power of the state. Surely, the dignity and autonomy of a mentally ill citizen charged with a capital offense is equally important, and that individual has a right to appear before the jury that will decide his fate drug free if that is his desire.<sup>2</sup> More significantly, this Court also affirmed the critical importance of the defendant's appearance as an integral part of the defense message.

For this reason, the Court has condemned unnecessary state imposed controls on how a defendant will be presented to the jury. The state cannot

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<sup>2</sup> This brief does not address the serious impact that the State of Nevada's forced drugging of David Riggins upon Mr. Riggins' liberty interest in avoiding unwanted antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment. See Washington v. Harper, \_\_\_\_\_ U.S. \_\_\_\_\_, 110 S.Ct. 1028, 1036 (1990). Amicus Curiae anticipates that this issue will be addressed in other briefs filed with this Court.

compel a citizen accused of a crime to stand trial before a jury while dressed in identifiable prison clothes. Estelle v. Williams, 425 U.S. 501, 504-5 (1976). Further, external shackles or gags to restrain a defendant have only been justified in the rare situations where that practice is necessary to control a stubborn, disobedient defendant. See e.g., Illinois v. Allen, 397 U.S. 337, 344 (1970).

In the instant case, David Riggins' appearance and behavior as it was at the time of the offense is a critical component of his insanity defense in the charge of first degree murder.

The state courts that have addressed the issue now presented to this Court have, with virtual uniformity, recognized that the trier of fact is entitled to consider the defendant's demeanor in

court on the issue of whether or not the defendant was legally insane at the time of the charged offense. E.g., Commonwealth v. Louraine, 390 Mass. 28, 34-35, 453 N.E.2d 437, 442 (1983); People v. Hardesty, 139 Mich. App. 124, 140, 362 N.W.2d 787, 795 (1984); People v. Van Daver, 79 Mich. App. 539, 541-42, 261 N.W.2d 78, 79 (1977); State v. Hayes, 118 N.H. 458, 462, 389 A.2d 1379 (1978); In Re Pray, 133 Vt. 253, 257, 336 N.E.2d 174, 177 (1975); State v. Maryott, 6 Wash. App. 96, 101, 492 P.2d 239, 242 (1977); State v. Murphy, 56 Wash. 2d 761, 355 P.2d 323 (1960). The Murphy Court found the defendant's demeanor in an unmedicated condition relevant to the determination of whether the death penalty should be imposed and reversed the defendant's conviction when forcibly medicated during his trial. Murphy, 355 P.2d at 327.

The Louraine Court reversed the defendant's conviction for first degree murder on facts remarkably similar to the instant case. Louraine, 453 N.W.2d at 439. The victim had been repeatedly stabbed. Id. The defendant had a long history of mental illness, suffered hallucinations, was diagnosed as a paranoid schizophrenic, and heard voices. From the time of his arrest until trial, the defendant was held in a state hospital and given increasing dosages of anti-psychotic medications including Mellaril, the same medication forced upon David Riggins. Id. at 440-41.

The Massachusetts Supreme Judicial Court began its analysis with the proposition that the defendant has a fundamental right to present his version of the facts. 453 N.E.2d at 441.<sup>3</sup> The

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<sup>3</sup> The court cited Washington v. Texas, 388 U.S. 14, 19 (1967).

Louraine court made clear that a defendant is entitled to place before the jury any evidence which is at all probative of his mental condition. Id. at 442. Stressing the importance of the jury's view of the defendant's demeanor, the Court stated:

In a case where an insanity defense is raised, the jury are likely to assess the weight of the various pieces of evidence before them with reference to the defendant's demeanor. Further, if the defendant appears calm and controlled at trial, the jury may well discount any testimony that the defendant lacked, at the time of the crime, substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law. . . . This tendency may render also valueless the defendant's right to testify on his own behalf.

Id.

The court found that the ability to present expert testimony describing the effect of medication on the defendant was not an adequate substitute for the presentation to the jury of the defendant's own demeanor in an unmedicated condition. Id. In the end, the Court recognized the inherent unfairness of the State's control over the demeanor with which the defendant will be presented to the jury.

'If the state may administer tranquilizers to a defendant who objects, the state then is, in effect, permitted to determine what the jury will see or not see of the defendant's case by medically altering the attitude, appearance and demeanor of the defendant, when they are relevant to the jury's consideration of his mental condition.'

Id. (quoting State v. Maryott, 6 Wash. App. 96, 102, 492 P.2d 239 (1971)).

The Louraine decision is an important example of a state supreme court's recognition of the defendant's fundamental right to present his version of the facts unfettered by unjustified state interference that this Court recognized. More significantly, the Massachusetts Supreme Judicial Court in Louraine as well as other decisions cited herein, recognized that a defendant's own personality and demeanor is as equally important to the defendant's version of the facts as the defendant's right to testify in support of that version.

There is simply no more effective way to present the message of a defendant's lack of criminal responsibility due to a defective mental condition than to have the jury observe that defective mental condition at trial. "[N]o expert witness is as effective in making schizophrenia

real to a jury as is schizophrenia itself." Blinder, Martin, M.D. Psychiatry in the Practice of Everyday Law, 116 (1973). See also, Fentiman, L.C., Whose Right is it Anyway?: Rethinking Competency to Stand Trial in Light of the Synthetically Sane Insanity Defendant, 40 U. Miami L. Rev. 1109, 1127 (1986). However, in the instant case, the forced medication of Mr. Riggins dramatically altered his demeanor from that which existed at the time of the offense.

David Riggins testified that he had been hearing voices virtually all his life that he first believed were aliens and now believed to be the devil trying to possess his body. Mr. Riggins justified the homicide on two bases: first, his belief that the victim had killed two little girls in the past; and second, his belief that the victim had tried to kill Riggins by putting fiberglass in his water

supply and squirting his AIDS infected blood on cocaine prior to selling it to Riggins. Mr. Riggins was diagnosed as a paranoid schizophrenic by one of the psychiatrists who examined him. Yet, the jury was not permitted to see the real David Riggins. Mr. Riggins was under the influence of 800 mg. of Mellaril per day -- a sufficient dosage, according to one of the psychiatrists who testified, to "tranquelize an elephant."

One of the several side effects of a medication such as Mellaril on a paranoid schizophrenic is to reduce or eliminate the overt symptoms of schizophrenia. One of these side effects, akinesia, causes the defendant to feel a lack of energy, and to complain of being "dead inside," and to feel that everything is boring and that nothing matters. Fentiman, L.C., Whose Right is it Anyway?:

Rethinking Competency to Stand Trial in  
Light of the Synthetically Sane Insanity  
Defendant, 40 U. Miami L. Rev. 1109, 1129  
(1986) (quoting Van Putten, Why do  
Schizophrenic Patients Refuse to take Their  
Drugs?, 31 Archives General Psychiatry, 67,  
69 (1974)). See also, Kemna, Current  
Status of Institutionalized Mental Health  
Patients' Right to Refuse Psychotropic  
Drugs, 6 J. of Legal Med. 107, 110 (1985).  
From an external point of view, akinesia  
may alter the defendant's facial  
expressions so that the defendant appears  
in mild cases to "lack spontaneity of  
expression, and in severe cases to have a  
wooden 'mask-like' face." Fentiman, supra.

In view of the significant impact  
that medication with an anti-psychotic drug  
has upon an individual suffering from a  
severe psychosis, there can be little  
question that the State's forced medication

of David Riggins eliminated him as an  
effective messenger to communicate that he  
was insane at the time of the killing. The  
state's action further unconstitutionally  
interfered with the decision of Mr. Riggins  
and his counsel as to how his message of  
insanity at the time of the offense would  
be presented.

Mr. Riggins and his counsel were  
not able to independently judge how  
termination of medication would effect Mr.  
Riggins because the trial court never gave  
them that opportunity. Further, Mr.  
Riggins and his counsel were never able to  
independently decide whether and to what  
extent Mr. Riggins would testify on direct  
examination and how he would respond to  
cross examination in the absence of  
medication.

The State's action controlled Mr.  
Riggins' appearance just as clearly as it

would have if the state and not Mr. Riggins and his counsel had determined how Mr. Riggins would dress, the length of Mr. Riggins' hair, whether Mr. Riggins would appear with facial hair, or how Mr. Riggins would react to the testimony introduced against him at the trial.

The state imposed requirement that Mr. Riggins be medicated at trial in this case makes it constitutionally indistinguishable from other cases in which this Court has condemned unjustified interferences with the choice of a citizen and his counsel as to how that citizen's defense will be conducted. Herring v. New York, 422 U.S. 853 (1975); Brooks v. Tennessee, 406 U.S. 605, 612-13 (1972); Ferguson v. Georgia, 365 U.S. 570, 593-96 (1961).

## **2. The State's Forced Drugging of David Riggins Also Precluded his Counsel from Complying With the Governing Standards for Competent Representation in Death Penalty Cases that Command that the Defendant be Humanized**

Even the most competent criminal defense lawyers may not defend a particular client in the same way. Strickland v. Washington, 466 U.S. at 689. Yet, the literature prepared by counsel experienced in death penalty litigation makes unquestionably clear that in any death penalty case counsel are to do all that they can to humanize the defendant. The common sense reason for this unequivocal command to individuals charged with the responsibility of representing a capitally accused individual is that jurors find it much easier to vote for the execution of an "inhuman criminal" when all they know about him or her are the terrible facts of the crime. Jurors find it much more difficult

to vote for the execution of the accused when they are faced with evidence during the trial or during the penalty phase that brings the defendant to life as a living, breathing, feeling, human being who cares what happens to him or her. Goodpaster, G., The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U. L. Rev. 299, 335-36 (1983).

A review of publications from around the country addressing what should be done on behalf of a capitally accused client are consistent in their command that the client be humanized.

The California Attorneys for Criminal Justice and California Public Defender's Association recommend that counsel portray the defendant as a human being with positive qualities. California Attorneys for Criminal Justice and

California Public Defender's Association, 1991 California Death Penalty Defense Manual, Chapter 8, at 1 Penalty Phase Mitigation, (prepared by James S. Thompson and Michael Lawrence) (quoting Goodpaster, supra).

Georgia's manual states that "the objective of the defense at the sentencing phase will almost always be to humanize the person on trial and establish reasons, which while not excusing or justifying the commission of the crime, nevertheless help explain the client's life and provide a basis for his sentence less than death." Southern Prisoners' Defense Committee, 1987 Defending a Capital Case in Georgia 1009.

According to Mississippi's manual, the "jurors find it much easier to vote for the execution of a 'criminal' when all they know about him or her are the facts of a terrible crime. It is therefore

absolutely critical to humanize a client."

1991 Defending a Capital Case in Mississippi, Section B, at 23.

Finally, in Tennessee, it is essential that the jurors be made to see the defendant as a real, multi-faceted human being. The jury is less likely to impose death on a "person" than on a "vicious" animal. Tennessee Association of Criminal Defense Lawyers, 1987 Tools for the Ultimate Trial, The TACDL Death Penalty Defense Manual, 10.5-6 (2d Ed.).<sup>4</sup>

A defense lawyer charged with persuading a jury not to impose a sentence of death upon his client must vividly present the life and background of the client and present witnesses who can articulate those aspects of the defendant's

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<sup>4</sup> The pertinent portions of the above-cited publications are reproduced in the Appendix. (App. 1a-21a).

character that will establish mitigating factors about the client. Presentation of this type of evidence without what would be considered a normally warm responsive reaction by the defendant is ineffective and useless. Thus, a defendant sitting in the courtroom under the influence of heavy tranquilizers who is non-responsive and non-caring strips this presentation of its impact.

The presentation of mitigating evidence at the sentencing phase of a capital trial requires the enthusiasm and the participation of the defendant in the investigation stage of that process. Without the client's assistance, attorneys are unable to discover this valuable mitigating evidence. California Death Penalty Manual, supra, Chapter 8, at 3 (1991 Ed.). (App. at 1a -12a).

Anti-psychotic medication also generates a cognitive dulling that impairs the defendant's ability to remember, reason or function effectively in a complex learning situation. This effect of the medication can have a devastating impact on the defendant's ability to assist his attorney in preparing a defense. Further, the chemical flattening of a person's will can also lead to the defendant's loss of self-determination undermining the desire for self-preservation which is necessary to engage the defendant in his own defense in preparation for his trial. Fentiman, L.C., Whose Right is it Anyway?: Rethinking Competency to Stand Trial in Light of the Synthetically Sane Insanity Defendant, 40 U. Miami L. Rev. 1109, 1133 (1986).

Illustrative of the impact that the medication of David Riggins had upon him at his trial is the presentation of his

plea for life at the sentencing hearing. Mr. Riggins had prepared a statement to present to the jury in his own personal effort to persuade them to let him live. Because of the self-defeating impact of the Mellaril, Mr. Riggins did not have the inner strength to make this critical presentation on his own. His lawyer read this statement to the jury for him.

A common technique among those who represent the capitally accused is to present that individual personally to the jury in the sentencing hearing. Tools for the Ultimate Trial, the TACDL Death Penalty Manual, 10:5-7 (2d Ed. 1987) (App. at 20a). Although Mr. Riggins' and his counsel planned to use this technique, the State's action precluded them from implementing this time-tested practice.

Those experienced in capital litigation also emphasis the value of body

language between the attorney and client that assists in the humanization process. Body language such as touching the client, patting the client on the back, etc., assists in persuading the jury that the counsel considers the client a human being. Tools for the Ultimate Trial, The TACDL Death Penalty Manual, 10.5-6 (2d Ed. 1987). (App. at 15a-21a). A drugged mask-like figure sitting next to counsel who does not respond in a human way to the expressions of affection and respect by his counsel makes it difficult, if not impossible, to accomplish the command that the accused be humanized.

Finally, competent counsel know that physical appearance is something to which attention must be paid. Clothing is to be consistent with the courtroom and conservative attire that minimizes the gruesome aspects of the alleged crime

should be chosen. Appearance does not stop at clothing or hair, but, facial expressions and demeanor are all part of appearance. A medicated client's demeanor and expression should fit the strategy. When the strategy is to prove the defendant insane, the natural demeanor of the client must be preserved. See Tools for the Ultimate Trial, The TACDL Death Penalty Defense Manual, 10.6-7 (2d Ed. 1987). (App. at 15a-21a).

It is simply impossible to humanize a mask-like zombie -- the condition in which extreme dosages of Mellaril left David Riggins. Accordingly, Mr. Riggins' counsel, despite his best efforts, simply could not comply with this most basic standard applicable to counsel in capital cases.

### CONCLUSION

The impact upon the right to present a defense and the right to effective assistance of counsel as a result of the forced medication of David Riggins was concrete. David Riggins was precluded from presenting critical evidence of his mental condition at the time of the offense -- his behavior at the time of the offense and presenting a humanized individual to the sentencing jury. These impairments of his right to defend himself were without compelling state interest. No showing was made at the trial court that Mr. Riggins would be disruptive or disobedient if permitted to remain in the courtroom in his natural unmedicated state. There was further no specific finding that Mr. Riggins would become incompetent to stand trial if not forcibly medicated.

Thus, the infringements upon Mr. Riggins were without legitimate compelling justification. Accordingly, this Court should not sanction the state's interference with the manner in which Mr. Riggins and his counsel chose to defend against the charge and the imposition of a death sentence.

For all these reasons, the National Association of Criminal Defense Lawyers respectfully requests this Court to reverse the judgment of the Supreme Court of Nevada affirming Mr. Riggins' conviction.

Respectfully submitted,

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## APPENDIX

The California Death Penalty Defense Manual provides, in pertinent part:

**INTRODUCTION:** Counsel must recognize the difference between the role of the defense attorney in conducting a guilt phase defense and the role necessary in creating the case for life. Unlike the reactive perspective traditionally associated with "guilt" trials, counsel must approach a capital defense with an "active" perspective. This perspective requires a thorough understanding of counsel's obligations to investigate, prepare, and present a case for life in the penalty phase.

Understanding these obligations begins with a description of what type of evidence qualify as mitigation. As Professor Gary Goodpaster explained:

First, counsel must portray the defendant as a human being with

positive qualities. The prosecution will have selectively presented the judge or jury with evidence of defendant's criminal side, portraying him as evil and inhuman, perhaps monstrous. Defense counsel must make use of the fact that few people are thoroughly and one-sidedly evil. Every individual possesses some good qualities and has performed some kind deeds. Defense counsel must, therefore, by presenting positive evidence of the defendant's character and acts, attempt to convince the sentencer that the defendant has redeeming qualities. A true advocate cannot permit a capital case to go to the sentencer on the prosecution's one-sided portrayal alone and claim to be rendering effective assistance.

As the second element of the mitigating case, the defense must attempt to show that the defendant's capital crimes are humanly understandable in light

of his past history and the unique circumstances affecting his formative development, that he is not solely responsible for what he is. Many child abusers, for example, were abused as children. The knowledge that a particular abuser suffered abuse as a child does not, of course, excuse the conduct, yet it makes the crime, inconceivable to many people, more understandable and evokes at least partial forgiveness. Counsel's demonstration that upbringing and other formative influences may have distorted the defendant's personality or led to his criminal behavior may spark in the sentencer the perspective or compassion conducive to mercy.

(Goodpaster, "The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases." (1983) 58 N.Y.U. L. Rev. 299, at 335-36, quoted in

People v. Deere, (1985) 41 Cal.3d 353, 366-67).

The phrase "death is different" thus describes both the nature of the punishment and defense counsel's obligation. Simply stated, a capital defendant has the right to present all evidence that "might serve as a basis for a sentence less than death." (Skipper v. South Carolina, (1986) 476 U.S. 1, 4-5, quoting Lockett v. Ohio (1978) 438 U.S. 586, 605 [plurality opinion]). Indeed, the discovery, development, and presentation of mitigation evidence is limited only by the creativity of counsel.

To "portray the defendant as a human being with positive qualities" and "to show that the defendant's capital crimes are humanly understandable," counsel must conduct an exhaustive investigation of the defendant's background and social

history and make a well-conceived presentation of the mitigation evidence. In presenting the defendant's social history, counsel should be mindful to utilize lay witnesses to document important facts and expert witnesses to interpret that social history. Lay witnesses will include family members, friends, school teachers, probation officers, and prison and jail guards. Experts may include sociologists, anthropologists, biologists, chemists, criminalists, pathologists, psychologists, and psychiatrists; indeed, any person who has particular expertise in interpreting the effect of the defendant's background or situation as it relates to the imposition of sentence may testify. Together, these persons can address the impact the cultural, environmental, psychological and physiological factors

have had on the defendant's life, including his criminal behavior. . . .

## II. INVESTIGATING THE DEFENDANT'S BACKGROUND AND SOCIAL HISTORY

Preparing the penalty phase requires a thorough and aggressive investigation of the defendant's life and a considered determination of the reasons why the jury should impose a life sentence. (See J. Blum, "Investigation In a Capital Case: Telling the Client's Story," the Champion, at 27 (Aug. 1985)). Successfully building the case for life must begin at the onset of representation. As mitigation evidence is discovered, it should be woven into the overall defense strategy.

From a preparation standpoint, the mitigation phase makes capital cases the most complex form of criminal trial. It takes excruciating planning to successfully mitigate against the death penalty. An

extraordinary amount of time and effort is a prerequisite to a favorable result.

The source of this complexity is the fact that an effective theory of the case and a defense strategy for either phase of trial cannot be developed until counsel has a good idea of what evidence will be put on, and what procedures will be followed during the entire course of both phases. Strategy for the guilt phase cannot be developed until counsel knows what evidence he will present in the mitigation phase and what procedural limitations will apply. Any inconsistencies or incompatibilities between the defense case in the guilt and mitigation phases can be fatal to the client.

(M. Gleespan, "Mitigation Phase Motions," Ohio Manual, at VIII-I (1986)).

Thus, counsel must ensure that there is a "logical, orderly, and understandable transition" between the guilt, sanity, and penalty phases. (Id).

Counsel must be acutely aware of the important role that the defendant plays in the investigation stage. Without the client's assistance, counsel may be unable to discover valuable mitigation evidence or persuade witnesses to assist the defense. Counsel must be forewarned that a defendant may misinterpret the penalty phase investigation as a sign that the attorney lacks confidence in winning the guilt phase. Thus, counsel should clearly explain the purposes of preparing a strong penalty phase: to uncover information that may assist counsel in securing a fair settlement of the case, discover information that may assist in avoiding a guilt determination, and create the case

for life should the special circumstances be found true.

Every defendant has left a paper trail to his or her jail cell. Immediately upon appointment, counsel should begin collecting all documents and records concerning the client's life. . . .

Counsel's goal is to collect every piece of paper bearing the defendant's name, beginning with the defendant's birth certificate and birth medical records. Counsel should then gather all hospital, medical, school, mental health, employment, military, criminal, probation, jail, prison, and parole records, culminating with the defendant's current jail records. From these documents, counsel will obtain the names of numerous potential witnesses that must be interviewed.

After these documents have been gathered and witnesses interviewed, a

social history outline should be prepared. The defendant's social history outline sets forth the significant events that have occurred throughout the defendant's life. The purpose of this document is to provide a guide for understanding how genetic, environmental, psychological, and cultural factors have affected the defendant's personality development and behavior. A complete social history outline can only be created by reviewing the defendant's paper trail and interviewing all significant persons having knowledge of the defendant's life. The outline should start with the defendant's birth and end of his or her pretrial incarceration status. . . . Each entry in the outline should be referenced to the supporting documents or witness statement. In this way, the social history outline also serves as an index to the relevant records and materials that have

been gathered concerning the defendant's life.

After having completed the initial investigation, the defense team should begin planning the penalty phase. By this time, counsel should have acquired a complete mental health profile of the defendant. Counsel should begin this strategy listing all potential mitigation themes. The defense team then must decide which mitigation themes will be presented at the penalty phase. Themes will be considered and reconsidered, and evidence will be evaluated and re-evaluated. In the end, the rejection list may be much longer than the acceptance list. The winnowing of themes and evidence, however, will eventually lead to a consistent and well organized guilt/sanity/penalty phase presentations.

California Public Defender's Association, 1991 California Death Penalty Manual, Chapter 8; at 1-4 Penalty Phase Mitigation, (prepared by James S. Thompson and Michael Lawrence)

Defending Capital Cases in Georgia states, in relevant part:

The objective of the defense at the sentencing phase will almost always be to humanize the person on trial and establish reasons which, while not excusing or justifying the commission of the crime, nevertheless help explain the client's life and provide a basis for a sentence less than death. Counsel should plan a closing argument based primarily on various factors about the life and background of the client. Argue to the jury compelling reasons why in the unique circumstances of your client's life that life imprisonment is sufficient punishment.

Southern Prisoners' Defense Committee, 1987 Defending a Capital Case in Georgia 1009.

Defending a Capital Case in Mississippi, provides, in pertinent part:

As previously discussed, the entire purpose of the penalty phase is to convince the jury that your client should not be killed. Jurors find it much easier to vote for the execution of a "criminal" when all they know about him or her are the facts of a terrible crime. It is therefore absolutely critical to humanize the client.

1991 Defending a Capital Case in Mississippi, § B, at 23.

Tools for the Ultimate Trial -  
The TACDL Death Penalty Defense Manual,  
 provides, in pertinent part:

#### **HUMANIZE THE ACCUSED**

It is essential that the jurors be made to see the defendant as a real, multi-faceted human being. A jury is less likely to impose death on a "person" than on a "vicious animal." The process of humanizing a client is best accomplished in subtle ways.

Throughout the trial, counsel should talk about the defendant as a person, not as an object. One technique is to refer to the accused by name, rather than as "the defendant" or "my client." Whenever possible, counsel should talk about the defendant in expansive terms, giving information about background, including personality, poverty, lack of education or sophistication, and the fact

(if it exists) that the accused played a minor role in the planning or execution of the crime.

Body language can tell the jury that counsel thinks of the client as a human being. Whatever comes naturally is what will be most effective. The lawyer may stand behind the client, hands on the client's shoulders, when addressing the jury. Counsel may put a hand on the client's shoulder when talking to the client in the presence of the jury, pat the client on the back, etc. Although this behavior is intentional, it will be effective if - and only if - it is and appears to be sincere. Otherwise, it will seem patronizing at best. The mere fact that the lawyer is seen listening attentively to the defendant can communicate as much to the jury as anything counsel says about his or her feelings for

the accused. Similarly, the entire defense team should be seen treating the accused with respect.

The jury will be watching the defendant throughout the trial, so physical appearance is something to which attention must be paid. Clothing must be consistent with the solemnity of the courtroom, conservative attire that tends to minimize the sordid aspects of the alleged crime. The client should also be encouraged to modify his or her appearance (if necessary) to look more conservative and less threatening to the average juror. Wild, long, or unruly haircuts should be trimmed to a more conservative length and style; facial hair should be trimmed. (Of course, taking this too far may make the jurors think the defendant is trying to fool the identification witnesses).

Another way to humanize a client is to have family members appear before the jury both as witnesses and in showing visible support for the client. An alternative is an attempt to show, through lack of family support, that the individual on trial is a person that "no one cares about."

The defendant's social, educational and work history may be important. Counsel may have to explain how and why the client arrived in the situation that led to the homicide. It may be possible to develop traumatic episodes in the client's life and present them to the jury. Family members may be able to recount meaningful episodes, such as the client witnessing the death of a parent or a violent episode at an early age.

A significant part of this goal may include evidence on the client's mental

and emotional condition. Indeed, this type of evidence may be the focus of the entire sentencing hearing. When presenting evidence of mental condition, however, great care should be taken not to dehumanize the client. The point to emphasize is that many people have psychiatric illnesses; stress and mental illness are not uncommon in today's society. (Beware, however, the jurors' possible reaction that since many people suffer from stress and illness, it is all the more important that they handle it without committing murder).

In presenting these arguments, counsel must take care not to be seen as trying to excuse the defendant's conduct -- a theory that, in addition to being legally insupportable, is not terribly popular.

A related issue may arise when the client has been medicated in order to

achieve competency to stand trial. The medicated client's demeanor and condition should fit the strategy, while respecting the defendant's constitutional right to be present and participate in the trial.

Ake v. Oklahoma, 470 U.S. 68 (1985).

Finally, as discussed in Chapter 9, the accused's personal participation in the trial will give the jury the feeling that the defendant really is a person rather than a thing. The defendant may serve as co-counsel and conduct part of the voir dire or make a short statement to the jury. A more common technique is to have the client testify, at least at the sentencing hearing. The accused may be able to talk (or cry) his or her way out of the electric chair. Genuineness and sincerity are critically important here.

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Tennessee Association of Criminal  
Defense Lawyers, 1987 Tools for the  
Ultimate Trial, The TACDL Death Penalty  
Defense Manual, at 10:5-7.